CRIMINAL APPEAL No.337 OF 1988

Against the judgment and order dated 29.4.1988, passed in Sessions Trial No.116 of 1987/13 of 1987, by Shri A. Toppo, 3rd Additional District & Sessions Judge, Gopalganj.

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Bishwa Nath Singh …….. Appellant

Versus

The State of Bihar ….. Respondent

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For the Appellant : Mr. Alok, Advocate
Amicus Curiae

For the State : Mr. Lala Kailash Bihari Prasad
Senior Advocate, and
Public Prosecutor

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P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE MADHAVENDRA SARAN

S K Katriar & M Saran, JJ. The sole appellant is aggrieved by the judgment dated 29.4.88, passed by the learned 3rd Additional District & Sessions Judge, Gopalganj, in Sessions Trial No.116 of 1987/13 of 1987 (State of Bihar vs. Bishwa Nath Singh & two others), whereby he has been convicted under Section 302 of the Indian Penal Code. The other two accused persons, namely, Janki Devi (wife of the appellant), and Malti Devi (wife of Ram Autar Singh, the other brother), have been acquitted of the charges under Section 302 read with Section 34 of the Indian Penal Code. The cases of Janki Devi and Malti Devi, therefore, do not arise for our consideration. The convicted accused hereinafter will be described as the appellant.

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2. According to the Fardbeyan (Ext.1), of Girija Devi, recorded on 14.11.86, at 9 AM, at Rajiv Hospital Barauli, her husband, Maheshwar Singh deceased was in

the services of the Indian Railways at Alipur Dwar, West Bengal, and was visiting his family at village Barauli. About four days ago, he had cut woods from his own tree located nearby, had prepared bundles of the same for the purpose of jalawan, and had kept the same at their darwaja. The previous day, on 13.11.86, at 9 PM, their agnate Bishwa Nath Singh (the appellant herein), Janki Devi, and Malti Devi came upon their darwaja and wanted to take away the bundle of fire woods which was objected to by Maheshwar Singh. This was followed by exchange of hot words, the three persons went away and returned with Mushal and Danda and had struck Maheshwar Singh with the same. She and her elder daughter Manju, (PW 4), raised halla as a result of which co-villagers, Thag Ram, Ramashray Singh, and Udai Singh came there and separated them. Her husband was severely injured. Bishwa Nath Singh also ran after Manju but could not locate her whereafter he returned for the second time and struck her husband with Mushal on his head and went away. On halla, the co-villagers came and her husband was taken to Dr. A K Thakur, at Barauli Bazar, for treatment. He said in the morning that Maheshwar Singh should be taken to the Govt. Hospital, Barauli, who was already dead. The Fardbeyan goes on that Bishwa Nath Singh, Janki Devi and Malti Devi had hit her husband with the intention to injure him and cause his death. It is further stated that Bishwa Nath Singh was wielding Mushal, his wife Janki Devi was also wielding Mushal, and Malti Devi was holding a Danda. Fardbeyan was recorded in the handwriting of Amarnath Tiwary (PW 5), the Incharge of Barauli Police Station. The same was registered as

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Barauli P S Case no.190 of 1986, dated 14.11.86, under Section 302 read with Section 34, IPC.

3. On hearing rumour at Barauli Chowk, the I.O. had rushed to the hospital and investigation commenced. He recorded the Fardbeyan of PW 6, prepared the inquest report, and had referred the dead body for post mortem. This was followed by formal First Information Report (FIR) dated 14.11.86. On conclusion of the investigation, charge-sheet was submitted against the appellant and two others. By order dated 5.8.87, charge under Section 302 IPC was framed against the appellant. Charges were also framed against the said Janki Devi and Malti Devi under Section 302 read with Section 34 IPC.

4. The accused persons claimed innocence and wanted to be tried.

5. The prosecution examined seven witnesses in support of its case. PW 1 is Bichari Singh, who is a co-villager and cultivator and declared hostile. PW 2 Mangal Singh is also a co-village and agriculturist and declared hostile. PW 3 Vinay Kumar Singh was minor son of the deceased. PW 4 Manju Kumari is minor daughter of the deceased. PW 5 Amarnath Tiwary is the I.O. of the case. PW 6 Girija Devi is the informant and the widow of the deceased and PW 7 is Dr. B K Agrawal, Civil Surgeon of Sadar Hospital, Gopalganj, who held post mortem examination on the dead body.

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6. The prosecution proved the following documents :

(i) Ext. 1 – Fardbeyan in the handwriting of and proved by Girija Devi PW 5.

(ii) Ext. 2 – The formal FIR proved by PW 5.

(iii) Ext.3– The inquest report proved by PW 5.

(iv) Ext.4 – The seizure list of blood-

stained earth, blood-stained lathi and mushal proved by PW 5.

(v) Ext. 5 – Notice dated 10.12.86 from the I.O. to the three witnesses to appear before him for purpose of investigation proved byPW5.

(vi) Ext. 6 – The post-mortem report proved by PW 6.

(vii) Ext. 7 – The case diary proved by PW 5.

The prosecution proved the following material exhibits :-

Ext. I – Mushal,exhibited by PW 4

Ext. II- Danda,exhibited by PW 4

7. The defence did not examine any witness nor did it bring any document or material on record.

8. On consideration of the materials on record, the learned trial court held that the appellant and two others had gone over to the darwaja of the deceased, wanted to take away the bundle of firewood lying at his darwaja which was objected to by the deceased. The appellant had then returned to his residence close by, had returned back with mushal and struck the deceased on his head with the same leading to his death in the wee hours of 14.11.86. He convicted him under Section 302 IPC. He also considered the prayer on behalf of the defence for a lenient view on the question of sentence. The learned trial court held that the sentence of rigorous imprisonment for life is the only sentence to meet the ends of justice. He, however, acquitted the remaining two accused of the charges. Hence this appeal.

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9. PW 1 Bichari Singh is a co-villager and agriculturist. He was declared hostile. After a very brief examination-in-chief, he was offered for cross-

examination. PW 2 Mangal Singh once again is a co-villager and an agriculturist. After a brief examination-in-chief, he was declared hostile and was offered for cross-examination.

10. PW 3 is Binay Kumar Singh, minor son of the deceased and, according to the format of the deposition, was 8 years on the date of deposition on 10.9.1987. The occurrence had taken place on 13.11.86, which would mean that he was aged a little more than 7 years on the date of the occurrence. He stated in his examination-in-chief that it was about 9 pm, he along with his sister, father, and mother were at their darwaja. The appellant Bishwa Nath Singh, Malti Devi, and Janki Devi came there. There was exchange of hot words with his father due to the bundles of fire woods. His father was sitting. The appellant struck his father on his head with the iron side of the mushal. Janki Devi and Malti Devi had also assaulted him with lathi and danda. The appellant had chased his sister to beat her up but she ran away. The fire woods had been collected four days earlier. The appellant is his full uncle though lives separately. His father worked at Alipur Dwar Junction and had come home on leave. His father died on account of the assault. His father was taken to Barauli Hospital whereafter to Gopalganj Hospital. He had died on way to the hospital. He identified the appellant present in court. He claims to have recognized the other two accused persons.

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He has stated in his cross-examination that he was deposing while standing on a stool. He was being supported by a person standing behind him whom he did not recognize. (That person had been asked to hold the

witness so that he does not fall down). His sister is Manju Kumari (PW 4), had called him to Gopalganj. She is elder to him by about twenty years. He, however, says again that he is not sure as to the number of years by which she is elder to him. She is unmarried. His mother is at Alipur Dwar. He can count upto 100. He is studying in class I in the primary school in his own village. He is not aware of the name of the school. It was a moonlit night and the maarpit had taken place at his darwaja. The tree from which the fire woods were taken did not belong to his uncle. There was no exchange of hot words between the appellant and the deceased for partition of properties. The fire woods comprised of four bundles of Seesame which was being lifted by three accused persons. His mother was present there. His father asked them not to take away the same. No villager was present at the time of the occurrence. Thag Singh, Ramashray Singh, and Udai Singh had arrived after the occurrence. They had taken away his father to Barauli Hospital. He and his mother had also gone to Barauli where they stayed overnight. It was still dark when his father was taken away from Barauli to Gopalganj. He had left Barauli for Gopalganj in a trekker. He was unable to tell the exact time at the time of his deposition. Bishwa Nath Singh is Malti's husband. He was unable to tell her age. His chachi had delivered five lathi blows which had struck his father's head as a result of which his skull had broken. His father had fallen down whereafter the accused persons had fled away. He has also stated as follows:-

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" मेरे पिता को कुछ समय तक चिराई घर के पास गाड़

दिया गया था। ऐसी बात नहीं है कि मैं सिखाई बात कहा हूँ। "

PW 3 was obviously a child of just about 7 years at the time of occurrence and was deposing after a lapse of 10 months. At the time of deposition, he was reading in Class I. He appears to us to be an innocent witness and seems to have spoken truthfully. There are no embellishments in his evidence. There are some contradictions in his deposition which do not go to the root of the case and he has on the whole supported the prosecution case. The aforesaid portion of his cross-examination needs specific consideration which shall be dealt with at the appropriate stage.

11. PW 4 is Manju Kumari, the daughter of the deceased, and was aged 14 years at the time of her deposition on 11.9.87. She has stated in her examination-in-chief that she was reading in Class IX. The occurrence had taken place about 9 months earlier on Wednesday at 9 pm. She along with her younger brother, Vinay Kumar Singh (PW 3), her mother Girja Devi (PW 6), and her father were at their darwaja. The three accused persons came upon their darwaja and started lifting the bundles of fire woods. Her father asked them not to do so resulting in exchange of hot words. Her father said that they should collect their fire woods from some other tree. Her father did not allow them to take away the fire woods whereafter he sat down at the darwaja. The accused persons soon reappeared and the appellant struck her father with the iron side of the mushal which was sharp. He was struck while he was sitting. The other two accused persons had hit him with lathi and danda. She raised halla and, therefore, the appellant started chasing her. She ran away. Her father had fallen

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unconscious. He was then taken to Barauli Hospital. She had not accompanied him. The I.O. visited the place of occurrence next day at about 11 AM. He had passed away the following day in the morning. The I.O. had seized the mushal, danda, and blood-stained earth. The fire woods had been collected four days earlier. Her father was working at Alipur Dwar Junction in West Bengal and had come to the village on leave. The appellant is her own uncle but is separate. She identified the appellant present in court. She claims to have identified the other two accused persons who were not present in court.

She has stated in her cross-examination that her mother is working in the place of her father at Alipur Dwar. She along with her brother are living at the village home. She has further stated that her father's head had fractured on account of the mushal blow. No lathi blow had struck his head. The villagers had reached the place of occurrence after it was over. She along with her brother and mother were alone at the time of the maarpit. The villagers had not seen the accused persons leaving the place of occurrence. She has named the persons who had reached the place of occurrence. Her father was then unconscious. Her mother had tried to protect her father. She did not receive any injury. The occurrence had taken place for 15 to 20 minutes. Members of the two families were on visiting and dining terms.

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She was recalled at the instance of the prosecution and was again examined. She identifies the mushal which was used by the appellant to hit the deceased. He was struck with the iron end of the mushal. The mushal is of the length of 5 1/2" with iron fitted on one end. The same has been marked Ext.I. She identifies the lathi

marked Ext.II. which Malti Devi had used to hit her father.

In her second round of cross-examination, she has stated that mushal is used in thrashing paddy. The iron end of the mushal is round. Only one mushal blow had hit her father.

The witness is obviously a minor. She appears to be an innocent witness. There are no embellishments in her deposition and has substantially proved the prosecution case without any material contradictions.

12. PW 5 is Amarnath Tiwary, the Investigating Officer, of the case. He was at the relevant point of time posted as Incharge of Barauli Police Station. On 14.11.86 at 8.50 pm, while he was at the Chowk he had learnt of the information. The hospital and the thana are close by. He went over to the hospital where he recorded the Fardbeyan of Girja Devi (PW 6), the widow of the deceased. Fardbeyan is marked Ext.1. It bears the signatures of Mahatam Kuer and Dasarath Sah. Girja Devi had affixed her thumb impression on it. On the basis of the Fardbeyan, he had prepared the formal FIR, marked Ext.2. He had then prepared the inquest report marked Ext.3. There was foam at the mouth and blood out of the nose of the deceased. There was wound on the head which had been bandaged. There was injury by hard blunt substance on his body. He had seized blood-stained earth, blood-stained piece of bamboo, and a mushal. He proved the seizure list marked Ext.4 which bears the signatures of Bachha Singh and Lalan Singh. He had made attempts to have the appearance of the FIR witnesses but could not. He had, therefore, issued notices to Thag Singh, Ramashray Singh, and Udai Singh of the village

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Chhota Barhaya. He had proved the notice marked Ext.5, which bears his signature. He had visited the place of occurrence and gives the description of the place and surrounding areas. The mushal had iron at one end. After conclusion of the investigation, he had submitted charge-sheet. He identified the appellant.

PW 5 seems to have acted promptly and conducted the investigation, had prepared the inquest report, inspected and the place of occurrence and had seized the relevant articles. He is obviously not an eye-witness but his deposition is not inconsistent with the prosecution case to the extent he has deposed.

13. PW 6 is Girja Devi, the informant and the widow of the deceased. She has stated in her examination-in-chief that she has got her husband's job and is serving at Alipur Dwar. Manju Kumari (PW 4) is her daughter. Her husband was three brothers. Her husband was the eldest of the three, followed by the appellant whom she identifies. The youngest brother is quite separate for about ten years. The family properties have been partitioned. She has given a brief description of the surrounding areas of the place of occurrence. Her husband had come to the village on leave a few days ago. At the time of the occurrence, she along with Manju, Vinay, and her husband were at their darwaja. The appellant, his wife Janki Devi, and Malti Devi came there and started lifting the bundles of fire woods. Her husband asked them not to do so and told them to arrange their fire woods from the tree which led to exchange of hot words. The accused persons returned and reappeared soon thereafter. The appellant was yielding a mushal, and the two women were with lathis. Her husband

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was sitting at the darwaja. The appellant had struck his head with the iron side of the mushal whereafter Janki Devi had struck him with lathi. Malti had also struck him. Blood started flowing from his head and he fell unconscious. The appellant had chased her daughter to beat her up but she ran away. She had taken her husband to Barauli Hospital whereafter had gone over to Gopalganj Sadar Hospital by a trekker. While half way through, he died. She had brought the dead body to the Barauli police station. The I.O. had recorded her Fardbeyan which was read over to her and she had affixed her thumb impression on the same. Mahatam Kuer and Dasarath Sah had also affixed their signatures. The I.O. had visited and inspected the place of occurrence. He had seized the mushal, lathi and the blood-stained earth. The I.O. had prepared the seizure list. She identifies Bishwa Nath Singh, the appellant. She claims to have identified the other two accused persons.

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PW 6 has stated in her cross-examination that the appellant is her Devar, and Malti Devi is the appellant's wife. Janki Devi is also the wife of her Devar, Ram Autar Singh, the other brother, and is in service. The family had owned three Seesam trees one of which had been sold out. Two trees are still with them. There were no differences between them prior to the occurrence. They were on visiting and dining terms. Her husband had come to the village about 10 days prior to the occurrence. He had collected the fire woods from the trees about four days earlier. The appellant had not prevented him from drawing the fire woods from the tree. There was no quarrel between the two brothers prior to the occurrence. Her husband had asked him not to take

away the fire woods. He had removed the bundle from the head of the appellant which had fallen on the ground leading to exchange of hot words whereafter the accused persons started hitting him. Nobody was present at the time of occurrence. She, her daughter and her son were the only eye-witnesses. She was unable to give the years of birth of her children. When the I.O. had inspected the place of occurrence, the fire woods were tied in bundles and were not scattered. The I.O. had visited the place of occurrence at about 11 AM. The iron end of the mushal was blood-stained. Her Fardbeyan was recorded in the hospital. The skull had broken on account of the assault by mushal. He had fallen down unconscious whereafter the accused persons had fled away. The iron end of the mushal was round. The appellant had struck the deceased with the mushal while he was standing. She has denied the suggestion that the deceased had died on account of injury which he had received elsewhere.

It appears on a perusal of the deposition of PW 6 that she has supported her version as in the Fardbeyan, and the defence has not been able to elicit any contradictions in her statements.

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14. PW 7 is Dr B K Agrawal who was the Civil Assistant Surgeon at Sadar Hospital, Gopalganj, and had conducted post-mortem on the dead body on 14.11.86. He had found the following ante-mortem injuries :-

> "(i) Incised would on the middle of skull placed anterio-posteriorly 3"x 1/4" bone cavity deep.
> (ii) Bleeding from the nose.
> (iii) Bruise on the left shoulder 3" x 1 ¼"
> 2. On dissection there was fracture of parietal bone with brain material coming out of the injury and there was blood and blood clot inside the meninges and brain substance. There was blood clot inside the muscles and tissues under injury no.(iii).

3. In my opinion, death was due to injury no.(i) leading to haemorrhage, and shock.
4. मूसल में लोहा होता है । उसे सामी कहते हैं । अगर साभी pointed हो तो injury no. (i) हो सकता है ।
5. Injury no.(ii) is the result of injury no.(i)
6. Injury no.(iii) can be caused by hard blunt substance
7. This injury report is in my pen and signature Ext.6.
8. Injury no.(i) जो 3" है वह जख्म की लम्बाई है । injury no. (i) में जो 1/4" है वह जख्म की चौड़ाई है । यह injury no. (i) circular नहीं था । injury no. (i) टांगी तथा फरसा से हो सकता है । छूरी से नहीं हो सकता है ।
9. मूसल का सामी मैं देखा हूँ । वह circular होता है। वह टांगी जैसा या फरसा जैसा नहीं होता है ।
10. Skull tense structure है । Skull बहुत बड़ा (hard) होता है । Wounds caused by hard blunt substance on the skull sometimes gives appearance of incised wound. There was no external mark of injury on the nose. Injury no. (iii) is superficial in nature. There was no rapture of the skin in injury no.(iii)."

He has further stated in his examination-in-chief that on dissection there was fracture of parietal bone with brain material coming out of the injury and there was blood and blood clot, inside the meninges and brain substance. There was blood clot inside the muscles and tissues under injury no. (iii). He has opined that death was due to injury no.(i) leading haemorrhage and shock. Injury no.(ii) was the result of injury no.(i). Injury no.(iii) can be caused by hard blunt substance. He proved the post mortem report in his own writing which bears his signature marked Ext.VI.

He has in his cross-examination stated that the injury was 3" x 2" in length and was 1 ¼" in width, injury no.(i) was not circular and can be caused by sharp weapon like tangi or farsa. He had seen a mushal which is circular. The medical evidence seems to be consistent with the prosecution case.

15. The appellant was subjected to statements under Section 313, Cr.PC. He denied the circumstances put to him.

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16. Learned counsel for the appellant has submitted that out of the seven witnesses, two are official witnesses, two have been declared hostile, and the remaining three eye-witnesses are family members. The prosecution has not examined any independent witnesses to prove the prosecution case. He submits that PW 3 is a wholly untrustworthy witness, inter alia, on account of the last two sentences of his deposition set out hereinabove. He next submits that neither the witnesses stated in the fardbeyan nor the seizure list nor the inquest report was by the Prosecution Witnesses. He next submits that blood-stained earth was sent for chemical examination. He next submits that the opinion of the doctor does not support the prosecution case, inasmuch as all the witnesses have consistently deposed to the effect that the iron end of the mushal is circular, whereas the injury found on the skull of the dead body was linear. He has also pointed out a number of contradictions in the prosecution evidence. He has lastly submitted that there was no intention to kill the deceased. Their relationship was cordial, it all happened on the spur of the moment without any prior planning or intention to kill. In his submission, therefore, it is at least a case under Section 304 Part 2 of the Indian Penal Code.

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17. Learned Public Prosecutor has submitted that the I.O. of the case has given objective findings and seized the objects from the place of occurrence which in its totality is consistent with the evidence of the eye-witnesses. He next submits that the evidence of the eye-witnesses are consistent without any embellishment, and the evidence of the two official witnesses corroborates

the same. He has also tried to meet the contradictions pointed out by learned counsel for the appellant, and submits that the same do not cut at the root of the prosecution case, and are not such that the same cannot exist side by side with the prosecution case. He lastly submits that it is covered by Section 302 of the Indian Penal Code. There was no premeditation, but the appellant had encroached on the privacy of the deceased and his family members who were unarmed, and the appellant had assaulted him without any provocation on the part of the deceased. He is expected to be aware that an article like mushal 5ft. in length with iron end would in a natural course be sufficient to cause death.

18. We have perused the materials on record and considered the submissions of learned counsel for the parties. It is undoubtedly correct that two of the prosecution witnesses have been declared hostile, two are official witnesses, and the remaining three witnesses are first degree relations of the deceased. The occurrence had taken place at 9 PM in a remote village where the day comes to an end quite early and retire to their home and hearth. Therefore, it was not expected that any person outside the family would be present there. To this extent, credit should be given to the eye-witnesses not to have caused embellishments in their evidence and bring in co-villagers as eye-witnesses. This adds to the credibility of the eye-witnesses. Law is well settled that, in a situation like the present one, non-examination of the so-called independent witnesses is of no consequence. If that were not so, it would be encouraging production of witnesses falsely claiming to be eye-witnesses. Another important

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aspect of the matter is that the appellant, the two co-accused, and the deceased were first degree relations. Therefore, the co-villagers must be considering themselves to be equidistant to each one of them and, therefore, may have desisted from making any deposition in the matter. Law is equally well settled that the kind, quality and reliability of the eye-witnesses, who have deposed in support of the prosecution case, is of the greatest importance. In other words, the reliability of the three eye-witnesses in the present case have to be critically judged in collaboration with the two official witnesses, particularly the doctor.

19. The core of the prosecution case is that the deceased had prepared four bundles of Seesame fire woods four days earlier which were lying at his darwaja. The four family members were at their darwaja at 9 PM, and the appellant along with two women had approached there and wanted to take away the bundles of fire woods. This was resisted by the deceased leading to exchange of hot words. The three accused persons immediately withdrew to their residence close by and soon thereafter returned. The appellant had mushal in his hand, and the other two had lathi and danda with them. It appears that the appellant had lifted one or more than one bundle on his head which was removed by the deceased which had fallen on the ground leading to fatal assault on him by the appellant with the iron side of the mushal. The two women had inflicted lathi injuries who have been acquitted by the trial court and, therefore, we are not considering those injuries. A perusal of evidence of the three eye-witnesses clearly shows that they have consistently, without any material contradiction of any

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consequence, supported the core of the prosecution case. We should give credit to the two minor witnesses of such impressionable age whose father was killed in their presence, have not resorted to any embellishment, and appear to be innocent and trustworthy witnesses.

20. We must consider the last two sentences occurred in the cross-examination of PW 3 and set out in paragraph 10 hereinabove. The same in substance means that the dead body of his father, a Hindu, was buried. The normal mode and manner of disposal of the dead body of a Hindu in India is to burn the same in a heap of fire woods. Undoubtedly no explanation has come forth from the prosecution side as to why the dead body of the deceased, being a Hindu, was buried. The answer is not far to find. PW 3 was aged 7 years at the time of the occurrence. It is easy to imagine the situation for a child of 7 years finding his father being murdered by the hands of persons whom he knew as his close relations, in order to make him silent and give him solace, the family members must have given him so many assurances that his father would return soon. The deposition of such a minor witness to the aforesaid effect seems to be the result of one such assurance from the family members. In any case, the mode and manner of cremation of the dead body has never been in question in the trial and, therefore, it is of no consequence. It is entirely attributable to the impressionable age of the toddler.

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21. Learned counsel for the appellant has pointed out certain contradictions in the depositions of the three eye-witnesses. For example, whether the lathi blow had fallen on the left hand of the deceased or the right

hand or on his head. The contradictions appear to us to be of minor nature which do not hit the core of the prosecution case, and are not such that those cannot stand side by side with the substance or the totality of the prosecution evidence, along with the evidence of the official witnesses. This has to be read with the added factor that two of the eye-witnesses, the children of the deceased, must have been in a state of consternation and shock, and may not have remembered the blows on their father accurately. This has to be read with their age also. We, therefore, reject the contention.

22. The evidence of the Medical Officer is fully consistent with the prosecution case. The prosecution case as stated in the fardbeyan read with evidence of three eye-witnesses is that the appellant had struck the deceased with the iron end of the mushal, while he (deceased) was sitting, and the appellant was standing. In other words, the appellant must have been separated from the deceased by a few steps which accounts for the linear injury on the head of the deceased. If the mushal had struck the skull of the deceased in a perpendicular manner at the right angle, it would have caused circular injury. We are, therefore, of the view that the medical evidence is fully consistent with and corroborates the prosecution case.

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23. We must consider the contention of the learned Amicus Curiae that in view of the facts and circumstances of the case, it is covered by Section 304, Part II of the IPC. In his submission, the relationship was cordial between the parties, and the accused persons had approached the darwaja of the appellant with the sole intention to take away the bundles of fire woods.

There was no intention to kill him which happened without any intention, much less premeditation and happened on the spur of the moment. It appears to us that the deceased had collected the fire woods and made bundles of them four days earlier. There is no material on record to suggest that the same had been plucked from the trees belonging to the appellant. He had, therefore, no business to encroach the privacy of the deceased who was in the happy company of his family members including two toddlers at 9 PM in the night. He had obviously gone there with the determined intention to take away the bundles of fire woods, and his determination to hit him is quite discernible from the evidence to the effect that when the appellant was prevented by the deceased, the three persons had withdrawn and immediately reappeared variously armed without any loss of time. If there was no intention to hit him harsh, and had the intention only to lift the bundles of fire woods by show of anger, the appellant could not have been armed with deadly weapon like mushal. The 5ft. length of the mushal adds to the massive thrust of an iron end. If the intention were only to lift the bundles, the appellant would have been armed with a lathi like two other females. There is no evidence at all to suggest that the deceased had caused any provocation to the appellant to strike him. On the contrary, the accused persons had provided the motive and the provocation for the occurrence followed by the deadly blow of mushal. Law is well settled that certain conditions have to be satisfied to be covered by Section 304 Part II. The present case is not covered by any one of the circumstances under Section 304 Part II, the deceased

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did not give any grave or sudden provocation nor was he armed with any weapon. We are of the view that no such case has been made out.

24. On a perusal of the materials on record, we are convinced that the fatal assault committed by the appellant in the present case does not come within the purview of anyone of the exceptions of Section 300 IPC, for the deceased did not give any provocation, let alone grave or sudden provocation to deprive the appellant of self-control. On the contrary, the evidence shows that the appellant himself went and provoked the whole incident. It is also not possible to say that the appellant had acted in good faith. Nor it is possible to say that his action was covered by anyone of the Exceptions under Section 300 IPC. Culpable homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat of moment upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. These conditions are not satisfied in the present case for, it is true that pre-meditation is not proved, the fact remains that the appellant himself had gone over to the house of the deceased, and in any case the appellant had taken undue advantage by bringing the mushal from his house. Furthermore, the deceased or anyone of his family members present at the time of occurrence had no weapon in their hands, particularly in a situation where the deceased was sitting unarmed. That being the position, it is clear that the action of the appellant was not covered by anyone of the Exceptions under Section 300 IPC. He inflicted such bodily injury as he knew was

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likely to cause death and is squarely covered by Section 302 IPC.

25. In the result, the appeal fails and is dismissed. The conviction and the sentence recorded by the learned trial court are maintained. The bail bond is cancelled and the appellant is directed to surrender in the learned trial court forthwith.

26. The High Court Legal Services Committee, Patna, shall pay a sum of Rs.1000/- (Rs. One thousand) to Mr. Alok, Advocate, who has assisted the Court as Amicus Curiae.

(S K Katriar)

(Madhavendra Saran)

The Patna High Court
The 19th of September 2008
NAFR/ mrl

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